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AN INQUIRY

CONCERNING THE ORIGIN OF THE CLAUSE

IN THE

LAWS OF RHODE ISLAND (1719–1783) DISFRANCHISING ROMAN CATHOLICS.

BY

SIDNEY S. RIDER.

PROVIDENCE:
1889.

E. A. Johnson & Co., Printers.

PRELIMINARY NOTE.

With this tract the publisher begins the second series of the Rhode Island Historical Tracts. Like the former series, this will comprise twenty tracts, and each tract will be strictly confined to an issue of two hundred and fifty copies. Those who desire copies must signify that desire, or run the chance of obtaining them. The vastly enhanced price now reached by the former series, justifies the expectation that this series will also advance in pecuniary value to the holders of it long before the series is completed.

Section One.

It is now something more than a century since a charge of inconsistency, of the most serious character, was brought against the founders of the colony of Rhode Island. This charge was substantially, that having obtained a charter in which every English citizen, whether born in the colony, or resident therein, should be in the free exercise of his religious opinions without constraint; that liberty of conscience should be the law of the land; that a state was planted, in which the citizens pledged obedience only in civil things; that then, immediately these same founders enacted a law whereby Roman Catholics were denied the elective franchise, and denied all the political rights of citizenship. If this charge can be maintained, it is certainly very derogatory to the character of the founders of the colony of Rhode Island. Whether it can, or cannot be maintained, is the purpose of this inquiry. It has been iterated and re-iterated in every form, in books, in pamphlets, and in orations; and so it continues to be even to this time. An examination of the question was made in 1818 by Mr. Samuel Eddy, then Secre-

tary of State of Rhode Island, and from 1827 to 1835 Chief Justice of the Supreme Court. The result reached by Mr. Eddy was exculpatory of the founders; but notwithstanding it, the charge continues to be reiterated. This can result in the majority of cases, doubtless from ignorance of the existence of the refutation; in other cases those who make the charge rely on the ignorance of those who listen, and who, did they but know of the refutation would gladly cite it. Mr. Eddy's examination and refutation lie hidden in a most obscure and unsuspected situation; where no one would look and scarcely find, were they to look for it. This alone would be a sufficient reason for the present essay; but there are other reasons which push me into action. It is nearly seventy years since Mr. Eddy pursued his investigations. Materials are now at hand, which were denied to him; the scope of his paper was too narrow, and many points, small indeed in themselves, yet like braces in bridges, strengthening to the structure, were not touched upon. It is for these reasons that a re-examination of the question has been attempted. Mr. Eddy was the pioneer, I am only his follower, but I intend, and expect, with his assistance, to make a much stronger case than he has himself accomplished. With this end in view original investigations upon all the salient points have been made.

Nobody's say so, for anything of consequence, has been taken without having investigated the original authorities anew. The results of these investigations have so strengthened my opinion of the thorough integrity of Mr. Eddy as a man of research and as an honest writer, that I believe it safe to accept his conclusions almost without a question.

The charge originated with Mr. George Chalmers, and appears in his *Political Annals* (London, 1780, p. 276). It is as follows: "Amid the satisfaction occasioned by the obtention of the great object of the wishes of every one, an assembly composed agreeably to the Charter was convened in March, 1663. Among a great variety of ordinances which the circumstances of the Colony required, and which were enacted, one 'for declaring the privileges of his Majesty's subjects' is remarkable. It enacted; that no freeman shall be imprisoned or deprived of his freehold, or condemned but by the judgment of his peers or by the law of the Colony; that no tax shall be imposed or required of the Colonists but by the act of the General Assembly; that all men of competent estates and of civil conversation Roman Catholics only excepted shall be admitted freemen, or may choose or be chosen colonial officers." Thereupon Mr. Chalmers moralizes somewhat upon the ordinance: "What abundant reflex-

ions does this ordinance afford to the wise! Nothing is assuredly more incongruous than for a corporation created with special powers to endeavor by its own act to acquire privileges inconsistent with the patent which gave it existence. Yet that law plainly designed as its great charter is manifestly repugnant to the grant. By it "none were at any time thereafter to be molested for any difference in 'matters of religion.' Nevertheless a persecution was immediately commenced against the Roman Catholics, who were deprived of the rights of citizens and of the liberties of Englishmen." Mr. Chalmers refers for authority to *Laws*, p. 1-4. He means by this citation the *Charter, and Acts and Laws* of the colony of Rhode Island. He mentions no special Digest; but that is not material. There were five of these folio Digests, and the same law appears in four of them. Their dates appear in another place in this *Inquiry*. Following this, Mr. Chalmers presents the answers made by Peleg Sandford, governor of Rhode Island, to a series of questions proposed by the English Board of Trade. These answers bear date May, 1680. As given by Mr. Chalmers they are much curtailed. (*Chalmers Political Annals*, 1780, p. 282-5.) As given by Mr. Arnold (*Hist. of Rhode Island*, v. 1, p. 488-490) they are entire. Both writers ob-

tained them from the British State Paper Office. The answers to the *26th* and *27th* questions only, bear upon this inquiry. As given by Mr. Chalmers they are eviserated I therefore quote from Mr. Arnold: "To the 26th we answer that those people that goe under the denomination of Baptists and Quakers are the most that publiquely congregate together but there are others of divers persuasions and principles all which together with them injoy their liberties accordinge to his Majesties gratious Charter to them granted wherein all people in our Colloney are to enjoy liberty of conscience provided their Liberty extend not to licentiousness, but as for Papists we know of none amongst us." To the 27th that we leave every man to walke as God shall persuade their hartes and doe actively and passively yield obedience to the Civill Magistrate and doe not actively disturb the Civill peace and live peaceably in the Corporation as our Charter requires, and have liberty to frequent any meetings of worship for their better instruction and information, but as for beggars and vagabonds we have none amongst us; and as for lame and impotent persons there is a due course taken. This may further humbly informe your Lordships that our predecessors about forty years since left their native country and comfortable settlements there be-

cause they could not in their private opinions conform to the Lithurge, formes and ceremonies of the Church of England, and transported themselves and familyes over the Ocean seas to dwell in this remote wildernesse, that they might injoy their liberty in their opinions which upon application to his gratious Majesty after his happy restoration did of his bountifull goodnesse graunt us a Charter full of liberty of Conscience provided that the pretence of liberty extend not to licentiousnesse, in which Charter there is liberty for any persons that will at their charges build Churches and maintaine such as are called ministers without the least molestation as well as others." Signed by the Governor in behalf and with the consent of the Councill.

Concerning this apparently frank statement, Mr. Chalmers remarks (*Political Annals*, 1780, p. 284) "The Act before mentioned excluding Roman Catholics from the privileges of freemen was carefully concealed. It ought to be remembered that the representations of none of the Colonial governments during those days, especially of those which talked the most of religion, are to be implicitly relied on." Thus stands the charge made originally by Mr. Chalmers. Following him, other writers have repeated it. It appears in Mr. Holmes's *Annals* under the year 1663. It was repeated by Mr. Rawle in an *Address to the Agricul-*

tural Society of Philadelphia in 1818. It was alluded to by Mr. Verplanck in an *Address before the New York Historical Society in 1818;* but Mr. Verplanck in his subsequent editions, referred in refutation to Mr. Eddy's *Statement*, which, as he informs us, was first communicated to the New York Historical Society. Mr. Arnold in the *History of Rhode Island* (v. 2, p. 490) states the fact and says "the disabling clause had crept, no one knows how, or when, in the Act which defined the requisites of citizenship." Mr. Arnold endeavors to explain the anomaly, but fails to make clear what he does not understand. He makes no reference to Mr. Eddy's *Statement*. At a later period two other Pennsylvania gentlemen have reiterated the charge. Mr. Craig Biddle, in an address before the Pennsylvania Historical Society delivered, March 10, 1873, said (p. 24): "The mild and pious Roger Williams, who denounced the ecclesiastical tyranny of Massachusetts and fled into the wilderness to avoid its intolerence, does not appear to have been able to impress his views to their fullest extent on the province of Rhode Island, of which he was the founder, for in the oldest printed copy of the laws now extant, the Roman Catholics are excepted from the enjoyment of freedom of conscience. It has been well said that intolerence formed a part of the very atmosphere of

those times, and no one, not Luther or Calvin or Cranmer could escape its subtle infection." Again, before the same Pennsylvania Historical Society, in a lecture by Mr. William A. Wallace, delivered in October, 1882, it is stated that "Maryland was colonized by Roman Catholics, and it is due to truth to say that Calvert, Lord Baltimore, was the first in the history of the Christian world to seek for religious security and peace by the practice of justice, and not by the exercise of power" (p. 13). A complete answer to Mr. Wallace lies in the compact in the hand writing of Roger Williams at the head of the first record book of these Providence Plantations, wherein each citizen bound himself to be obedient to the orders of the majority *only in civil things*. This was in 1636. Concerning Maryland and the oath by which Lord Baltimore bound his Protestant lieutenant not to molest Roman Catholics, Bancroft (*Hist. U. S.*, v. 1, p. 168, ed. 1886,) says, "*it was devised in 1648 and not before.*" Such are a few of the citations which might be made. They exist in every form and are constantly recurring.

Let me now eliminate the charge. It is, that the founders of the colony of Rhode Island had no sooner obtained the charter from Charles the Second, in which entire religious liberty was guaranteed, than at their

first assembly after receiving it, to wit, March, 1663, they violated it by excluding Roman Catholics from political rights under it, and presented a religious test for the admission of freemen.

This charge is false as a whole, and false in every part, it has but the shadow of a foundation upon which to rest. The manuscript records of the period are perfect and unmutilated, and in them there is no such law, nor any law bearing even a semblance of such a law. In proof of this assertion anyone can go to the office of the Secretary of State and see for himself the record. The statement of Judge Eddy also confirms myself, or I affirm the correctness of what he said, "The proceedings of this session are entire, there is *not a word on record* of the act referred to, purporting to have been passed at this session." (*Walsh's Appeal*, p. 430.)

I do not propose to restrict or confine my denial of the enactment of this law to this particular session of March, 1663. I deny that it was ever enacted by the founders of the colony, either before or after that session. I deny that it exists now, or has ever existed in the manuscript records of the colony. I deny that it was ever true, in its spirit, or as a fact, as against the founders of the colony of Rhode Island.

"I have formerly examined the Records of the State

from its first settlement with a view to historical information, and lately from 1663 to 1719 with a particular view to this law excluding Roman Catholics from the privileges of free men and can find nothing that has any reference to it, nor anything that gives any preference or privileges to men of one set of religious opinions over those of another until the revision of 1745." (*Judge Eddy in Walsh's Appeal*, p. 431.)

Thus Judge Eddy confirms the present research, or as I have elsewhere written, my own researches confirm those made by him. The historical information which he speaks of having previously sought was for the purpose of publication in the collections of the Massachusetts Historical Society, and appears in the first series of those publications.

Mr. Eddy refers to the Digest of 1745 for the reason that he had never seen the previous Digests of 1730 and 1719. He knew that there had been published a Digest of 1719, and it may be that he brought his researches down to that year because of that fact.

That at a subsequent period, what purports to be such a law appears in the folio printed Digests of the Laws of Rhode Island cannot be denied. Nor can it be denied that in those Digests the law is declared to have been enacted in March, 1663; but the statement is not true, it was not then enacted. The note affixed

to the law in the Digests has no intrinsic force because it is therein printed. It would have possessed the same real strength had it been printed in any other book. The difficulty is that the writer of the note either blundered, or made a positively false statement. That which he wrote was not true.

Whatever may be the authority cited by any of those who have made or repeated the charge, for they differ in the matter of citations, their final authority must be the Digest of the Rhode Island Laws published in 1719, for therein the phrase first appears in print, and rest upon it they all must. This Digest of 1719 was the first ever put into print by Rhode Island. It is only since Mr. Eddy's time that copies have been known. Mr. Eddy himself never saw it, nor did he ever see the manuscript Digest of Rhode Island Laws made in 1705, both of which Digests have a material bearing upon this question. As preliminary, then, let me give some account of the publication of the Digest which first contains the incriminating clause —the Digest of 1719.

Publication of the Digest of 1719.

At the May Session, 1716, the General Assembly appointed a committee consisting of Mr. Nicholas Lang, Mr. Nathaniel Nudigate and Richard Ward,

"to transcribe the laws of the Colony in a regular form fit for the press, and to take the Governor's advice in all points of difficulty." Nothing was accomplished by this committee. The following year, at the October session, 1717, the General Assembly resolved that the laws of the colony "lie chiefly in schedules, and are very imperfectly drawn, and in the hands of very few persons, so that the major part of the inhabitants are not in a capacity to know the laws that are extant." Thereupon the General Assembly, without dissolving the former committee, created a new one. It consisted of Deputy Governor Joseph Jenckes, Major Thomas Frye, Mr. Nathaniel Nudigate and Richard Ward. This committee was authorized "to revise, correct, transcribe, and fit for the press, all the laws of this colony now in force, as well those in schedules as those in the abstracts." A majority of the committee had power to act; this, since the committee consisted of four persons, might often make a division difficult. In such cases, or in cases of other difficulties, the Governor was authorized to advise therein. Under this committee the work appears to have been accomplished. At the June session, 1718, the General Assembly ordered "that the General Recorder (Richard Ward) proceed to transcribe and fit the laws for the press, *with mar-*

ginal notes thereon; and to be compared, when finished, by the Governor (Samuel Cranston) and Major Frye, and that Major Frye get them printed. This was done, for at the May session, 1719, the General Assembly ordered that Major Frye should have £10 "for his trouble and pains in getting the laws of this colony printed;" and it was further ordered that Major Frye pay into the general treasury "the £18 in his hands which was left after the purchase of the law books of Mr. Nicholas Boone." There also appears the following declaration and order: Whereas, this Assembly have purchased of Mr. Nicholas Boone fourscore law books, it is ordered that they be disposed of in the following manner: First, every member of the Assembly to have one, every town to have one, and the remaining 29 copies were to be given to Newport (4), to Providence (5), to Portsmouth (3), to Warwick (3), to Westerly (3), to New Shoreham (2), to Kingstown (5), to East Greenwich (2), to Jamestown (2).

The charter was prefixed to the laws by an order of the General Assembly made in September, 1718.

There is no record of the enactment or re-enactment of the Digest of 1719 by the General Assembly. Hence it must follow that all propositions which had not, before the publication, been enacted in legal form,

and had become laws, did not by the fact of publication among genuine laws become themselves genuine. That there were cases of this kind is clearly proved by the action of the General Assembly at its very next (September) session. At that time it appointed a committee consisting of Governor Cranston, Lt. Col. William Coddington and Richard Ward "to correct the errors of the press committed in printing the laws of the colony, and to get them printed." (*R. I. Col. Rec.*, v. 4, p. 257). This extraordinary action shows two things—(1st) that there were gross errors; (2d) so gross, and so numerous as to justify the General Assembly in having the *Errors* printed to accompany the genuine laws. I cannot discover that this project was carried out; if it was, no copy of the *Errors* is known to exist. On this point Judge Eddy says: "The Laws have been uniformly revised by committees. Their practice has been to embody in one all the different laws on the same subject previously passed, with such additions and amendments as they thought proper, confirmed, however before publication by the General Assembly." (*Walsh's Appeal*, p. 431.)

Mr. Eddy failed to discover the fact that this confirmation did not take place in the case of the Digest of 1719, and hence all the additions and amendments

of the committee, and among them these religious tests, were spurious.

In the case of the unpublished Digest of 1705, elsewhere mentioned, the whole book was re-enacted, and bears upon itself the re-enacting clause. This is the case with but one of the succeeding folio Digests. One of them declares within itself its authenticity. It is that of 1767.

Not an individual was then (1719) a member of the General Assembly, nor indeed alive, who lived at the time of the planting of the colony in 1636. Nor was there then (1719) a single individual in the government of the colony in any capacity, who was in its service at the period (1663) when the charter went into operation.

Having found the men who actually prepared the Digest of 1719, and shown that the laws which they prepared were, many of them existing only in abstract form, and when drawn were very imperfect, and that these men were not among the founders of the colony, it is pertinent to enquire into their antecedents, their positions, and so far as is possible into their religious predilections.

The men actually concerned were Deputy Gov. Jenckes, Major Thomas Frye, Mr. Nathaniel Nudigate and Richard Ward; and upon Richard Ward, alone,

the duty of transcribing, fitting the laws for the press, and making marginal notes finally devolved.

Joseph Jenckes, deputy governor, was born at Pawtucket in 1656. He became deputy governor in 1714. His tombstone bears the inscription that he was a zealous Christian. His *Reply to Wilkinson* shows him to have been of the Baptist persuasion and a very earnest person in following his religious beliefs. The Baptist historians, both Mr. Backus and Mr. Benedict, speak in terms of the highest commendation of his religious zeal.

Richard Ward was a grandson of Richard Ward, who was a member of Cromwell's cavalry, and who came to Newport on the accession of Charles the Second. Richard Ward, the recorder, was born 1689. A quotation concerning the grandfather appears in a recent biographical sketch which claims to have been taken from Mr. Backus the Baptist historian, "that he was a baptist before he came out of Cromwell's army, and a very useful man in the Colony." Mr. Ward was the secretary of state, and the scrivenor of the committee. He became subsequently governor. It seems impossible to escape the conclusion that this unfortunate blunder was the work of this gentleman. He affixed the marginal notes, and the dates, and they are almost invariably erroneous.

Nathaniel Nudigate, or Newdigate, appears in the Colonial Records in 1707, as a plaintiff in a suit. He is there designated as "a merchant of Bristol." He next appears on the committee on the laws; and in 1719 as a plaintiff in another suit wherein he is designated "of Newport, gentleman." In 1720 a Mr. Nathaniel Newdigate of Newport, gentleman, was admitted a freeman. In 1728 he was again on a committee of revision of the laws which resulted in the Digest of 1730. How it was that this "gentleman" appears on a committee to revise the laws before he became a legal citizen of the colony, I do not attempt to explain. I simply give that which appears. The supposition that there were two "gentlemen" by this name does not appear to be well founded, nor would it, if true, explain the incongruity. I have not discovered his religious beliefs.

Thomas Frye was General Sergeant in 1677. He was among the original proprietors of the town of East Greenwich, and was long prominent in the affairs of that town. He was for many years representative in the General Assembly, clerk of the house, justice of the peace, road and tax commissioner, speaker of the house (1722), deputy governor (1728), and held other minor offices. His name does not appear in connec-

tion with any religious sect. His inclination seems to have been political.

Having described the publication of the book wherein first appeared the obnoxious law, and described the men who made it, the law must now be reproduced, it being as before stated, the authority upon which all writers must ultimately rest.

It is found in the *Acts and Laws of the Colony of Rhode Island*, Boston, 1719, (p. 3.) It is an act for declaring the rights and privileges of his majesty's subjects within this colony, and is in these words: "Be it enacted by the General Assembly of this Colony and by the authority of the same it is hereby enacted that no Freeman shall be Taken or Imprisoned, or be deprived of his freehold or liberty or free customs, or outlawed or exiled or otherwise destroyed nor shall be passed upon, judged or condemned but by the lawful judgment of his peers, or by the law of this Colony, and that no Aid, Tax, Tailage or Custom, Loan, Benevolence, Gift, Excise, Duty or Imposition whatsoever shall be laid, assessed, imposed, levied, or required of, or an any of his Majesties subjects within this Colony, or upon their estates upon any manner of pretence or colour whatever, but by the Act and Assent of the General Assembly of this Colony.

"And that no man of what estate and condition soever shall be put out of his lands and tenements nor taken, nor imprisoned, nor disinherited nor banished, nor any ways destroyed, nor molested without being for it brought to answer by due course of Law; and that all rights and privileges granted to this Colony by his Majesties Charter be entirely kept and preserved to all his Majesties subjects residing in or belonging to the same; and that all men professing Christianity and of competent estates and of civil conversation who acknowledge and are obedient to the civil magistrate though of different judgments in Religious Affairs (Roman Catholicks only excepted) shall be admitted Freemen and shall have liberty to choose and be chosen Officers in the Colony both millitary and civil." Thus stands the law. The laws in these folio Digests were published in chronological groups. This law appears in the first group. At the head of the group stands these words: "Laws made and Past by the General Assembly of his Majesties Colony of Rhode Island and Providence Plantations in New England begun and held at Newport the first day of March, 1663." The second group of laws has the heading that they were made and passed at the May session, 1666. Hence the inference would be that no public law was enacted in Rhode Island between the

years 1663 and 1666. The law in question with slight and immaterial verbal changes appears in the folio Digests of 1719, 1730, 1745 and 1767. It was repealed by the General Assembly in February, 1783 (*Acts and Resolves*, Feb. 1783, p. 79), and in the repealing act it is stated that the original law was enacted on the first day of March, 1663.

The charge has been clearly stated and so far as the founders of the colony are concerned has been refuted. The foundation on which the charge has rested has also been clearly shown. It lies in the annotation first made by Richard Ward in the printed Digest of Rhode Island laws of 1719 It must be admitted that Mr. Chalmers, and those who came after him, would be perfectly justified in bringing the charge, and basing it upon these printed Digests. They had no means of verification. They might well take that to be true which had never been disproved, nor even denied. As it there appears the case was strong against the founders, but it is now demonstrated that the case cannot be maintained; that these printed authorities were not correct.

The law quoted by Mr. Chalmers has been shown, not to have been enacted at the time (March 1, 1663) as claimed by him. Hence it must appear that the note in the Digest upon which he relied was incorrect.

The compilers of the Digest of 1719 erred in fixing the date 1663 to the first group of laws in that Digest. Their error instead of being corrected in the subsequent Digests, was perpetuated by the compilers of the subsequent Digests.

Previous to the publication of the Digest of 1719, the law as therein printed cannot be shown to have had any existence, neither in the form, nor in the spirit, in which it there stands.

Let me further continue the investigation. Mr. Robert Walsh, Jr., seems to be the first person who raised the question of authenticity. This was in 1818. He made application to the Honorable James Burrill, Jr., then a United States Senator from Rhode Island. Senator Burrill referred the application to the Hon. Samuel Eddy, then and for upwards of twenty years previously, the Secretary of State of Rhode Island, and subsequently Chief Justice of the Supreme Court, as herein stated. Mr. Eddy's *Statement* appears in Mr. Walsh's *Appeal*, pp. 429-435. It reaches the conclusion as Mr. Walsh states "that the restriction in the law to those who profess Christianity and the exception of Roman Catholics was introduced *after the year* 1688" and that the object of its introduction was solely to win favor in England in the reigns of William and Anne."

It is probable that Mr. Chalmers quoted from the Digest of the laws of 1745, and that that edition was the earliest that Judge Eddy had seen. Hence he also used it. That the edition of 1719 has been used for the purpose of this inquiry, will, however, make no difference in the result. The law was the same in both editions. That of 1719 was here used because it was the first, and because the law appears nowhere earlier than in that one.

In January 1704, the General Assembly appointed a committee to transcribe the laws, and prepare them for printing. (*R. I. Col. Rec.*, 3, p. 493.) In June, 1705, the General Assembly put upon record the fact that this work "is completed for the most part," and appointed another committee to "view over and perfect said laws." (*R. I. Col. Rec.*, 3, p. 524.) This manuscript absolutely perfect is now in the office of the secretary of state. It was finished, to, and partly including, the year 1705. It was never printed. The law in question is *not contained in it.* Hence it is conclusive proof against its existence at that date.

The first five lines of the law in question were enacted, not in 1663, but in 1647. They can be found in the *Proceedings of the First General Assembly of 1647*, (p. 18,) in these words, "that no person in this colony shall be taken or imprisoned or be dis-

seized of his lands or liberties or be exiled or any otherwise molested or destroyed, but by the lawful judgment of his peers or by some known law, and according to the letter of it, ratified and confirmed by the major part of the General Assembly lawfully met and orderly managed." These words came from *Magna Charta* (chap. 29), and they can be found in the manuscript of 1705.

The last and by far the most significant section reads thus, "And that all men professing Christianity and of competent estates and of civil conversation who acknowledge and are obedient to the civil magistrate though of different judgements in religion, (Roman Catholics only excepted), shall be admitted freemen and shall have liberty to choose and be chosen officers in the colony both military and civil."

In May, 1665, the King, Charles the Second, sent a commission to Rhode Island, with five propositions for the consideration of the colony. The second of those propositions is in the following words: "That all men of competante estates and of civill conversation who acknowledge and are obediente to the civill magistrate though of differing judgements may be admitted to be freemen and have liberty to choose and be chosen officers both civil and military." (*R. I. Col. Rec.*, v. 2, p. 110.) This phrase was enacted at once into their

laws verbatim (*R. I. Col. Rec.*, v. 2, p. 113). It will be observed that the words of the statute of 1719 "*professing christianity*" and "*Roman Catholicks only excepted*" are neither in the proposition from the king, nor in the enactment of 1665.

Let me reproduce the two laws side by side. I quote from the printed Colonial Records because it is more easily compared by those who are curious. The law as therein printed is correct, from the original manuscript.

R. I. Col. Rec., v. 2., p. 110, May, 1665.

"That all men of competente estates and of civil conversation who acknowledge and are obedient to the civil magistrate though of differing judgments may be admitted to be freemen and have liberty to choose and to be choosen officers both civill and [military.]"

This was the proposition sent by the King Charles the Second in 1665, and enacted into a law by the Assembly. (*R. I. Col. Rec.*, v. 2, p. 112.)

Acts and Laws of the Colony, 1719, p. 3.

"And that all rights and privileges granted to this Colony by his Majesty's Charter be entirely kept and preserved to all his Majesty's subjects residing or belonging to the same; and that all men *professing christianity* and of competente estates and of civil conversation, who acknowledge and are obedient to the civil magistrate, though of different judgements in religious affairs (*Roman Catholicks only excepted*) shall be admitted Freemen and shall have liberty to choose and be chosen officers in the Colony both Millitary and civil.

The law which the *founders* of the colony enacted contained no religious tests whatever. These tests first appear in the Digest of 1719, with which not one of the founders was in any way connected. These tests are printed in the preceding law in italics.

It being denied that these religious propositions have any existence in the Manuscript Colonial Records and hence could not have been legal enactments before the printing of the Digest of 1719, it is now denied that by the publication of that Digest they became the law of Rhode Island.

This leads to the question what constitutes a law? The term is used in its narrowest sense, a statute, an act of the legislative power prescribing a rule of action, a positive law. The definition given by Mr. Stephen seems to be the most exact "a rule of civil conduct prescribed by the supreme power of the state." (*Stephen's Commentaries*, v. 1, p. 25.)

A proposition laid before the supreme legislative power is not a law prescribed by that power, until it has been acted upon by that power, accepted by it, made a matter of record, promulgated. It then becomes positive law.

Those words only become law which were acted upon by the supreme legislative power, and were so recorded, and so promulgated. Words introduced,

interpolated, into a statute, by parties who are not the supreme legislative power have not the force of the original statute. Such words are not law. They are spurious.

A committee, or a commission, to revise, collect, codify laws are not the supreme legislative power. It It is only an instrument of that power appointed for a certain work. It cannot make, enact, ordain or establish positive law. The work done by it is not law. It can become law only by the act of the supreme legislative power. This was admitted by the General Assembly itself.

At the July session 1715 (*R. I. Col. Rec.*, v. 4, p. 195), a committee was appointed to "transcribe, fit and prepare for the press all the laws," and it was ordered when the work was completed "to present them (the laws) to the Assembly for their confirmation thereof."

Let us then, believing the positions here assumed, to be sound, examine that which was done in the matter of the Digest of 1719, and find how far that which was done is in accordance with these conditions.

A committee was appointed by the General Assembly, "authorized to revise correct transcribe and fit for the press all the laws of this Colony now in force." (*R. I. Col. Rec.*, v. 4, p. 226.) Subsequently, the

General Assembly ordered the general recorder (Richard Ward) "to transcribe and fit the laws for the press with marginal notes thereon; and to be compared when finished by the Governor and Major Frye, and that Major Frye get them printed. (*R. I. Col. Rec.*, v. 4, p. 234.) Again, subsequently, the General Assembly ordered that Major Thomas Frye pay the £18 in his hands (which was left after the purchase of the law books of Mr. Nicholas Boone) into the general treasury;" and thereupon the General Assembly made an order of distribution; (*R. I. Col. Rec.*, v. 4, p. 248) which order was preceded by the statement that "this Assembly have purchased of Mr. Nicholas Boone fourscore law books."

Nothing appears of record to show that this committee ever submitted their transcription of the laws to the General Assembly. Nothing appears of record showing the acceptance by the General Assembly of the body of laws which the committee prepared. It must then follow, that, there being no re-enactment of the entire book, such propositions, as had not previously been enacted into laws, did not become laws, by reason of their being incorporated by the committee among the genuine laws in this book.

Such then is the position which I maintain concerning these religious interpolations. I have denied

their existence in the manuscript records of the colony. I now deny their force as law in the first Digest. They were spurious interpolations. They next appear in the Digests of 1730 in a very different condition from that in which they had before appeared.

The Digest of 1730.

The same law, for by such term it must now be designated, appeared in the Digest of 1730. A material change now took place in the status of the law. This will be shown by a history of that publication. It was the second of the folio printed Digests published by the colony.

At the June session, 1728, the General Assembly appointed a committee to "revise the laws" of the colony "in order to be printed." This committee comprised the following persons: Mr. Richard Ward, Col. Daniel Updike, Capt. Henry Bull, and Mr. Nathaniel Newdigate. Two of those persons had served upon the committee which made the Digest of 1719, ten years before.

This committee performed its work, and at the February session, 1728-9, submitted it to the General Assembly. It was by that body accepted and approved

by the following vote: "Voted and Enacted by this Assembly that the several laws revised, repealed, explained, and acts presented to the Assembly by the committee appointed for that purpose in order to be put in print be allowed and approved of." (*R. I. Col. Rec.*, v. 4, p. 417.)

By this action the interpolations of 1719 became the law of the colony. A religious test was by the law applied to persons admitted to the elective franchise, otherwise called freemen, and Roman Catholics were denied admission as freemen.

I am not unaware that Mr. Arnold has said (*Arnold's Hist. R. I.*, v. 1, p. 311) that these words "professing Christianity" and "Roman Catholics excepted" "were never placed there at all by the deliberate act of the Legislature of Rhode Island," but Mr. Arnold is in error.

These propositions having now (1729) for the first time become the law of the land, may be examined, or considered, as law. The charter was the grant of the king, Charles the Second; it was by general consent, and as a matter of fact, the fundamental law of the colony. As such it stands printed at the beginning of every Digest. It bore the same relation to Rhode Island that the constitution of the United States bears, so far as legislation was concerned. Under either in-

strument the General Assembly could make no laws repugnant to either instrument.

By the charter the General Assembly was established and its powers thus defined: It had full power and authority "from time to time to make, ordain, constitute or repeal such laws, statutes, orders and ordinances, forms and ceremonies of government and magistracy as to them shall seem meet for the good and welfare of the said company, and for the government and ordering of the lands and hereditaments hereinfter mentioned to be granted, and of the people that do, or at any time hereafter shall inhabit or be within the same; so as such laws, ordinances and constitutions so made, be not contrary and repugnant unto, but as near as may be agreeable to the laws of this realm of England." (*Digest of R. I. Laws, 1730*, p. 7.)

The grant of liberty of conscience in this charter is in these words: "That no person within the said colony at any time hereafter, shall be any wise molested, punished, disquieted or called in question for any differences in opinions in matters of religion, and do not actually disturb the civil peace of our said colony; but that all and every person and persons may from time to time, and at all times hereafter, freely and fully have and enjoy his and their own judgments and con-

sciences in matters of religious concernments, throughout the tract of land hereafter mentioned; they behaving themselves peaceably and quietly, and not using the liberty to licentiousness and prophaneness, nor to civil injury, or outward disturbance of others; any law, statute, or clause therein contained, or to be contained, usage or custom of this realm to the contrary hereof in any wise notwithstanding." (*Digest of R. I. Laws, 1730*, p. 5.)

Under the strong light of these fundamental laws, let me now consider the Act of the General Assembly. The act is first declaratory, and second, directive. It declares that all the guarantees of the charter shall be preserved to all his majesty's subjects residing, or belonging in the colony of Rhode Island; and then directs the application of a religious test to all freemen, or voters, and directs the exception of Roman Catholic citizens from becoming freemen.

Here, then, appears to be a plain, palpable contradiction in the act itself. No case ever arose under the act. Hence there has been no judicial construction of it. Had there been a case brought under the act, what possible construction could a court have put upon it? Were the court to sustain the application of the religious test, what became of the chartered rights of a citizen, which the act itself declared should be preserved?

or should the court declare the chartered rights paramount, what becomes of the directive portion of the act? If the popular view is correct the act as a whole could not have been enforced. The nineteenth maxim of Vattel concerning the interpretation of statutes seems to bear upon the case. "The interpretation ought to be made in such a manner that all parts appear consonant to each other, that what follows, with what went before." (*Potter's Dwarris on Statutes*, p. 128.) Can it be made to appear that the directive portion of the act was consonant to or agreeable with the declaratory portion?

The chief guarantee in the charter was that no person should be called in question for any differences of opinion in matters of religion. It has been popularly held that this act violated that principle; but can that view be maintained. The charter granted liberty of conscience to every person; it did not make every person a freeman, or voter. Did not this act preserve liberty of conscience to every person, while it discriminated concerning those who should exercise the powers of government? This discrimination the charter did not prohibit. If the popular opinion was correct, the General Assembly had no power to prevent the enemies of liberty of conscience from exercising powers of government in a government the corner stone of which

rested upon that foundation. If the popular view is correct, the General Assembly by this act abrogated the most valued of the rights which the charter conferred upon a citizen. Could the General Assembly abrogate the charter, or any part of the charter? Most certainly it could not.

If the popular view is correct, the act as a legal proposition was an absurdity, and from the standpoint of political ethics indefensible; and it was directly opposed to the whole spirit of Rhode Island history. That it could have been so understood, or enforced, seems impossible.

The General Assembly exercised the power of admitting freemen, and of prescribing the conditions of such admission. The scope of this power has never been carefully defined.

It is therefore necessary at this point in this inquiry to examine the powers of the General Assembly concerning the elective franchise, and concerning the conditions of admitting freemen. The charter made every human being in the colony, without regard to age, sex, color or condition, into a body politic, and it created a corporation with certain powers. In enumerating these powers the charter gives the names of twenty-five corporators and then speaks of "all such others as now

are, or hereafter shall be admitted and made free of the company" (*Charter*, p. 5) by these corporators.

Then, after creating the General Assembly, the charter defines the powers of that body. Among these powers is that of admitting freemen. This is the wording of the grant: "And to choose nominate and appoint such and so many other persons as they shall think fit and shall be willing to accept the same to be free of the said company and body politic and those into the same admit." (*Charter*, p. 7.) The conditions which might be imposed upon English subjects on being admitted freemen subsequently to the acceptance of the charter, are not laid down in the charter. That it was within the power of the General Assembly to prescribe conditions, and change the same at will, there can be no question. Within two years after the granting of the charter a proposition came from the English Government to the General Assembly suggesting the adoption of certain conditions. One of these conditions was that the person making application for admission should possess a competent estate. At the suggestion of the English Government this condition was imposed by the General Assembly. At a later period this competent estate was made to consist of land by an act of the General Assembly. Thus it is clear that it was an admitted principle, both in England

and in this colony, that the corporators had the power under the charter to prescribe certain conditions upon the admission of freemen. But the question arises whether among the conditions which it was within the power of the General Assembly to prescribe there could be a religious test. The charter does not provide that an English subject who desired to become a citizen of Rhode Island shall or shall not possess land. The only imposition upon such a person, or grant to him, was that he should never be called in question for any differences in opinion in matters of religion.

These are the terms of the grant, preceded by the declaration and petition of the colonists: "Whereas in their humble address they have freely declared, that it is much on their hearts, if they may be permitted to hold forth a lively experiment, that a most flourishing civil State may stand, and best be maintained, and that among Our English Subjects, with a full Liberty in religious concernments." (*Charter*, p. 4.) * * * "That Our Royal Will and Pleasure is, that no person within the said Colony at any time hereafter, shall be any wise molested, punished, disquieted or called in Question for any Differences in Opinion in Matters of Religion, and not actually disturb the civil peace, of our said Colony; but that all and every person and persons may from time to time, and at all times here-

after, freely and fully have and enjoy his and their own judgments and Consciences in Matters of Religious Concernments." (*Charter*, p. 5.) It has been held that whatever conditions the General Assembly might impose upon an English subject, on his being admitted a freeman, the one condition of a religious test they had neither the right nor the power to impose; that to make a man make a profession of Christianity, and swear that being a Christian he was not a Roman Catholic, on his being admitted to be a voter, was the application of a religious test to a citizen; that such men would be called in question for differences of opinion in matters of religion, which the charter denied should be done. Such were the opinions popularly held; but are they correct? We think not. The charter gave liberty to all; it did not give the right to participate in the government to all. The freemen must give liberty of conscience to all; they might restrict the powers of government to men of like opinions with themselves

The purpose for which this inquiry was begun has been accomplished. It was to discover the origin of these religious tests. This has been traced to the men of 1719 and of 1728. Thus the charge against the founders of the colony has been successfully defended. The work was the work of men of another century.

These men it was no purpose of mine to defend; but in a subsequent part of this tract the political condition of England, her legislation, and her judicial decisions have been suggested as indicative of the course which the Rhode Island colonists thought proper to pursue. How far these things may operate in justification of their action must be left to the intelligent judgment of men.

There are some collateral points which have been lightly touched, but which may be further enlarged before closing this part of this essay.

Roger Williams was, before all other men, the founder of this colony. He was the first man in the world to give form and practical experiment to the doctrine of liberty of conscience. This doctrine to the day of his death, in 1683, he maintained. He was an assistant, or senator, as we now term the office, in 1663-4. It was at the March session of the General Assembly that year, that the charter was accepted and went into operation, and at which this alleged deprivation of Roman Catholics of liberty of conscience is claimed to have been enacted. He was not a member of the General Assembly in 1665, which was the year of the adoption and enactment of the proposition of Charles the Second concerning the admission of freemen. He was a deputy, or member of the representatives, in 1677, and he was an assistant in 1670-71. He was again elected

an assistant in 1677, but from some cause declined to serve. This closes his political history. For many years subsequent to the alleged enactment of this statute he was alive, with an intellect unimpaired, and in the active service of the colony.

To ask us to believe him guilty of the inconsistency of being a party to the enactment of a statute which should abridge the liberty of conscience requires too much strain upon our credulity. We declare him not guilty, and deny that he had any part in the enactment of the statute as it now stands, and maintain that even if he had any part in it, it shows no inconsistency, for the reason that the liberty of conscience of a Roman Catholic was not abridged by it. No man had a clearer understanding of the difference between civil and religious liberty. With him it was clear that a person might be bound to support a civil government, and at the same time remain in complete possession of his religious liberty; and yet not be an officer in the government.

Mr. Williams likens a commonwealth to a ship: "There goes many a ship to sea with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth or a human combination, or society. It hath fallen out sometimes that both Papists and Protestants, Jews and

Turks may be embarked in one ship; upon which supposal I affirm, that all the liberty of conscience that ever I pleaded for, turns upon these two hinges—that none of the Papists, Protestants, Jews or Turks be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any. I further add that I never denied, that notwithstanding this liberty, the commander of the ship ought to command the ship's course, yea and also command that justice, peace, and sobriety be kept and practiced, both among the seamen and all passengers. If any of the seamen refuse to perform their services, or passengers to pay their freight; if any refuse to help in person or purse, toward the common charges, or defence; if any refuse to obey the common laws and orders of the ship, concerning their common peace or preservation; if any shall mutiny and rise up against their commanders and officers; if any should preach or write that there ought to be no commanders nor officers, because all are equal in Christ, therefore no masters, nor officers, no laws, nor orders, nor corrections nor punishments; I say I never denied but in such cases, whatever is pretended, the commander or commanders may judge, resist, compel, and punish." (*Williams's Letters*, p. 279.)

Holding those clearly defined opinions, would Mr.

Williams have demanded of a Papist, or Roman Catholic, that he abjure his religion before he would be permitted to go on board the ship, or come into the commonwealth? Would he have demanded that a Turk should swear an oath professing Christianity, before he should be allowed to enter the ship?

In May, 1716, the General Assembly passed an act to prevent the taxing of the community for the maintenance of clergymen. In the preamble to this law it is stated "there was a Charter granted to this His Majesty's Colony in which contained many gracious privileges * * amongst others that of free liberty of Conscience in Religious Concernments * * it being a moral privilege due to every Christian. * * And this present Assembly being sensible by long experience that the aforesaid privileges by the good Providence of God having been continued to us has been an outward means of continuing a Good and Amicable agreement amongst the inhabitants of this Colony." (*Digest of 1719*, p. 80.)

If the law excluding Roman Catholics had been upon the statute books for upwards of half a century, and possessed the meaning claimed, how could the Assembly have put this preamble into a law? This law was enacted in 1716, three years before the publication of the obnoxious statute.

The question of the correctness of the dates in the various Digests under which the laws are grouped, is of so much importance that I again refer to it for the purpose of giving some examples, showing in a clear way their incorrectness.

Judge Eddy refers in his *Statement* to the unreliable character of the dates which are invariably attached to the laws in all the folio Digests. He points out the fact that in the Digest of 1745, the earliest which he had seen, that "the *whole* of every law purports to have been passed at a particular session, notwithstanding the fact that it was composed of a number of acts passed at different times." In the Digest of 1767 some of those years are printed on the margin of the laws. Mr. Eddy's statement is true also with reference to the Digests of 1719 and 1730, neither of which he had seen. He points out the fact that none of the laws of either Digest are dated before March, 1663-4, the time of the first meeting of the General Assembly under the charter. He also affirms that "*not one section of any one of them was passed at this session.*" He relies for this statement upon the records of the colony, a foundation upon which we all must rest. He then gives the history of a law which the Digest of 1745 declares was passed at the March session, 1663-4. It is the law establishing a colony seal. As there printed

the law reads: "That there be one Seal made for publick use of the colony; and that the form of an Anchor be engraven thereon: And the Motto thereof shall be the word HOPE." Precisely the same law appears in the Digest of 1730; but the form *is different* in the Digest of 1719, notwithstanding the fact that it was declared to have been enacted at the same period as declared in the laer Digests. Thus it is in the Digest of 1719. It forms the third section of an act for preventing clandestine marriages (p. 13), and reads: "And be it further enacted by the Authority aforesaid that the Colonies Seal shall have Engraven thereon an Anchor. And the Motto thereof shall be the word HOPE."

Mr. Eddy then traces the earlier history of this law. "In the laws of 1647 it is ordered that the seall of the Province shall be an anchor." No changes were made in this law until the May session, 1664, when a new seal having been made it was ordered "that the seal with the motto *Rhode Island and Providence Plantations*, with the word *Hope* over the head of an anchor is the present seal of the Colony." This continued to be the seal until 1686, when it was broken by Sir Edmond Andros at the time the charter was surrendered.

In February, 1689, the charter having been resumed

it was ordered by the General Assembly "that the seal brought in by Mr. Arnold Collins being the anchor with the motto HOPE is appointed to be the seal of the Colony." This seal at the time Mr. Eddy wrote, 1819, was still in use in the secretary's office, there never having been any other order relating to it. This analysis of dates as given in these Digests might be carried to great length. It is so fruitful a field that I propose enlarging a little upon it by tracing the history of one or two other laws, and the way in which they were treated by the compilers of those folio Digests. My object is to compare the Digests with each other, and show the differing dates given to the same laws in them. I will take first the law relating to weights and measures, which appears in the Digest of 1719 and is there declared to have been enacted at the March session, 1663, which, however, it was not. This law minus the last section, appears *verbatim* in the Digest of 1730 (p. 177) and is there declared to have been enacted in 1728. Thus these two Digests give two different dates for the enactment of this law, neither of which is correct. The law provides a stated set of weights and measures as standards. The General Assembly at its May session, 1698, enacted a law in which it declared that "there *are not* stated weights in measures in the Colony," and that that fact was a

"discouragement of strangers to deal" with the inhabitants of Rhode Island, and it further declares that at its October session, 1674, it had ordered such a set to be purchased and established to be the "generall standards" of the colony. All this could not be true if the dates in either Digest were correct. (*R. I. Col. Rec.*, v. 3, p. 334.) I will give one more example, that of the criminal code. The date assigned by the Digest of 1730 to this code is February, 1728, but the Digest of 1719 ascribes to it the date of March, 1663. Neither is true, it appears practically in the form given by both Digests, in the code of 1647. Thus I confirm the statement made by Judge Eddy that "not one section of any of these laws (ascribed to March, 1663) was passed at that session, but I have further shown that the Digests themselves differ materially as to the dates which each Digest ascribes to these laws. In this respect, not the slightest accuracy can be accorded to them, or if this be too strong an expression, the reader may temper it to suit himself.

Before taking leave of this portion of my essay, I wish to refer to another charge made by Mr. Chalmers against Rhode Island. It appears in these words (*Political Annals*, London, 1780, p. 276,) "Nevertheless a persecution was immediately commenced against the Roman Catholics, who were deprived of the

rights of citizens and of the liberties of Englishmen." Where is the man so ignorant of the history of Rhode Island, as not to know that there is in that statement not a single word of truth. No sectary, whatever may have been his opinion, was ever persecuted here in Rhode Island. The utmost was to attempt to persuade by argument, as in the case of the Quakers, and such incorporeal things as witches were not molested even by argument.

No persecution of a Roman Catholic ever took place in Rhode Island. Even under this statute a Roman Catholic could dwell here in peace and safety, his property and his person secure. He could worship God according to the dictates of his own conscience, his church only controlling him. He would have been taxed by a government which he could have no part in creating. It was taxation without representation. A person may be a citizen of a country without the privilege of holding a political office in that country, or being endowed with the elective franchise. As a matter of fact, are not one-half of the present population—the women—in that condition, in Rhode Island to-day?

The action of the founders of the colony of Rhode Island in connection with the persecutions of the Quakers by the colonies of Plymouth and Massachusetts Bay, still further illustrates their steadfast hold

upon the doctrine of liberty of conscience. It was in 1657. Plymouth asked Rhode Island to banish and exclude the Quakers, and at the very time Plymouth banished and sent into Rhode Island these innocent victims of her unjust laws. The government of Rhode Island replied by a letter written by Roger Williams, in which are these words: "We have no law among us whereby to punish any for only declaring by words, &c., their minds and understandings concerning the things and ways of God as to salvation and an eternal condition." (*Hazard's State Papers*, v. 2, p. 553.) It was a clearly laid down principle by the government in this letter that, while breaches of the peace should be punished, absolute freedom of conscience should be maintained. The following year, in March, 1658, concerning the same matter, the General Assembly of the Colony sent to Plymouth another letter, in which are these words: "Now whereas freedom of different consciences to be protected from inforcements was the principle ground of our Charter, both with respect to our humble sute for it as also to the true intent of the Honourable and renowned parliament of England in grantinge the same to us; which freedom we still prize as the greatest hapines that men can possess in this world." (*R. I. Col. Rec.*, v. 1, p. 378.) At a later period during the same year, to wit, November

5, 1658, the General Assemby of Rhode Island sent a letter to Mr. John Clark, then the representative of the colony to the English government, which letter was to be presented to "his Highness and Councell" Richard Cromwell, Lord Protector, in which Mr. Clark was urged "to plead our case in such sorte as wee may not be compelled to exercise any civill power over men's consciences soe longe as human orders in poynt of civility are not corrupted and voyalated." (*R. I. Col. Rec.*, v. 1, p. 398.) These things took place only five years before the alleged denial of liberty of conscience to Roman Catholics.

Section Two.

The positions which will now be taken, are, that it would have been a piece of political folly for the founders of Rhode Island to have interpolated clauses into the law proposed by Charles the Second withholding political rights from the religious sect toward which all the religious sympathies of that king extended; that by their charters they were to make laws which were not repugnant to the laws of England; that by the terms of the Rhode Island charter, laws which were in conflict with the laws of England were void; that an Englishman was under the charter entitled to the same political rights that a native born citizen enjoyed; that under the charter the colony had no power to enlarge the political rights of Englishmen; that liberty of conscience was not withheld from a Roman Catholic; that political rights, only were withheld; that the colony of Rhode Island, by reason of the political condition of England, and by reason of the peculiar condition of her charter, had good reason to believe that the obligation rested upon her to do that which she did.

The restoration of Charles the Second took place in 1660. Mr. Chalmers says, "the event gave *great satisfaction* to these (Rhode Island) plantations because they hoped to be relieved from that constant dread of Massachusetts which had so long afflicted them. They immediately proclaimed Charles the Second because they wished for protection, and intended soon *to beg for favors.*" (*Chalmers' Pol. Annals*, p. 274.) The charter granted by this king came in 1663, after long solicitation on the part of the colony. Concerning its arrival Mr. Chalmers says, "amid the satisfaction occasioned by the obtention of the *great object of the wishes of every one*, the Assembly met." (*Annals*, p. 276). The year following, in 1664, Mr. Chalmers relates that this same king sent commissioners to Rhode Island. Mr. Chalmers is here in error concerning the date. It was in May 1665 that the commissioners came. These small errors became of consequence at this precise period. These "Royal Deputies" he says, were received "with the greatest attention and deference." It was into the second proposition sent by the king by these royal deputies that it is charged that the founders of the colony interpolated the clause exempting Roman Catholics from political rights, which Mr. Chalmers states was done in 1663. There is no conflict

of authority among English historians concerning the religious predilections of the king. He was a Roman Catholic. Mr. Hume states that "the King had imbibed strong prejudice in favor of the Catholic religion * * In those revelations of temper when the love of raillery gave place to reflection * * he had starts of more sincere conviction." At such times this "sect which always possessed his inclination and was master of his judgment and opinion." (*Hume Hist. England*, v. 5, 474.)

In 1662, Charles the Second "openly avowed that he did not mean to exclude Catholics from some share of that indulgence which he had promised to tender consciences." (*Lingard, Hist. England*, v. 9, p. 44.)

Mr. Greene says: "Whatever religious feeling Charles the Second had was on the side of Catholicism. He encouraged conversions among the courtiers, and the last act of his life was to seek formal admission into the Roman Church." (*Greene's Short History of England*, p. 620.).

There can be no question of the correctness of the statements by Mr. Chalmers concerning the sentiment of the Rhode Island colonists towards Charles the Second. Would it then be credible that in adopting the propositions sent by the king and enacting it into the form of law as they did, that they interpolated a

clause prohibiting from the rights of freemen a single religious sect, and that the one which the king was known to favor and towards which all his sympathies extended. There was not at the time nor for many years subsequently a single Roman Catholic in the colony. The thing is positively absurd. The law which they enacted came from the king of England, himself a Catholic, and contained no exclusion of Catholics, nor of any other sect whatever.

In 1731 Deputy Governor Jenckes, who had been a member of the committee of revision of the digest of 1719, became governor of Rhode Island. A question arose as to the possession of the veto power by the governor under the charter. It was refered to the king, and by the king to the law officers of the crown. (*R. I. Col. Rec.*, v. 4, 458.) Their answer was "that the Governor of Rhode Island had no veto power, that it was his duty to seal attested copies of public acts, but not necessary that he should examine them before sealing; and more than all, that the King himself had no power reserved in the Charter, either to sanction or to veto, any act of the Assembly that was not inconsistent with the laws of England; but if any act conflicted with these, then it was in itself void by the terms of the Charter." This reply was taken by Mr.

Arnold from the British State Paper Office, and appears in *Hist. R. I.*, v. 2, p. 108.

Even had the colonists of Rhode Island interpolated into the propositions sent to them by the same king who granted their charter the clause excluding Roman Catholics, it would have been without effect, because it would have been in conflict with the laws of England. Mr. Chalmers shall himself be here the authority. (*Political Annals*, London, 1780, p. 276.) "Had the ordinance before mentioned been insisted an, they (Roman Catholic English men) might have justly contended that the Assembly could not make a regulation contrary to the royal act which gave it existence. The corporation had been empowered to make laws which should not be repugnant to the jurisprudence of England."

This charge of making laws which were repugnant to the laws of England, was one which, at this period, (1686-1736) was continually being brought by the English government.

In the year 1721 *Mr. Dummer* in his *Defence of N. E. Charters*, p. 4, speaks of the introduction some six years before (in 1715) of a bill for regulating the charter and proprietary governments. The bill was twice read. One of the complaints alleged in the bill against the New England, governments was that

they had made laws which were repugnent to the laws of England. Mr. Dummer enters upon a defence of the New England governments the fourth point in which turns upon the construction of the word *repugnant*. His argument is that the word means "*diametrically opposite to*," and that since no such laws have ever been made, that the accusation is not well founded.

In regard to these charter governments of English plantations, *Blackstone* says they were given "power of making by laws for their own interior regulation not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters." (*Commentaries*, 1781, v. 1, p. 108).

"These American Plantations were subject to the control of Parliament though not bound by any acts of Parliament unless particularly named." Again: "But it is particularly declared by Statute (*7 and 8 Will. 3*, Chap. 2.) that all laws, by laws, usages, and customs which shall be in practice in any of the plantations repugnant to any law, made or to be made in this Kingdom relative to the said plantations shall be utterly void and of none effect." (*Blackstone Commentaries*, 1781 v. 1, p. 108.) But these crystallizations of law took place at a much later period than that which we have under consideration.

It is now necessary to enter upon another phase of this question, to wit, the political status of Roman Catholics in the Mother Country, the English statutes concerning them, the decisions of the English courts of the time under those statutes, the political condition so far as citizenship in England of a Rhode Island colonist, and the legislative power of the Rhode Island General Assembly under their charter. Judge Eddy in his "Statement" (*Walsh's Appeal*, p. 434) remarks: "I am inclined to think that the exception of Roman Catholics in the *printed* laws was inserted with a view of ingratiating the Colony the more with the Mother Country." Mr. Walsh, in commenting, "says the object of its introduction and continuation was solely to win favor in England in the reigns of William and Mary."

Let me now undertake to show that at the time of its enactment there was no other course open to the General Assembly; that the Rhode Island colony could enact no act declaratory "of the Rights and Priviledges of His Majesties subjects within this Colony" and include Roman Catholics in it. The General Assembly was obliged to exclude them under the conditions of her charter.

To show this it will be necessary to refer to

English legislation with reference to the subject of Papists, or Roman Catholics.

By the law of parliament Englishmen were debarred from sitting in either house as members except they subscribed the following declaration: "I Richard Roe, do solemnly and sincerely, in the Presence of God profess, testify and declare that I do believe that in the Sacrament of the Lords supper there is not any transsubstantiation of the Elements of Bread and Wine into the Body and Blood of Christ at or after the Consecration thereof by any person whatsoever, and that the Invocation or Adoration of the Virgin Mary, or any other Saint, and the Sacrifice of the Mass, as they are now used in the Church of Rome are superstitious and idolatrous," etc. An oath of allegiance to Charles the Second was also required. (*30 Chas. Sec.*, Stat. 2, 1677.)

By a law of parliament all Papists or Roman Catholics were debared from inheriting or purchasing lands. (*11, 12 and 13 William 3*, Chap. 4, Sec. 4, 1700.)

By a law of parliament all civil and military officers in Great Britian, every attorney or barrister, or other law officer and every other person admitted to any office, were obliged to take the oaths of supremacy and of abjuration, and subscribe the declaration of

Charles the Second. (*1 George I*, Stat. 2. Chap. 13, 1714.)

By a law of parliament no person in the kingdom of Great Britain could take, hold, or possess lands without registering them and taking the oaths above specified and the declaration of Charles the Second. The time expired under this law when the oaths could be taken, 24th June, 1716. But for those persons in America the time was extended one year or until 24th June, 1717. (*1 George I.*, Stat. 2, chap. 55, 1715.)

Rhode Island could make no laws which were in conflict with these laws. The charter conferred upon the colonists of Rhode Island the power to make such laws as they thought proper, "so as such laws be not contrary, and repugnant unto, but as near as may be *agreeable* to the laws of the Realm of England." (*Charter*, Ed. 1744, p. 7.)

This charter also conferred upon "every the subjects of us, already 'planted' in the Colony of Rhode Island or which shall hereafter go to inhabit, and all and every of their children, which have been born, or shall hereafter to be born there, all Liberties and Immunities of Free and Natural Subjects, born within the Realm of England." (*Charter*, Ed. 1744, p. 13.)

That the inhabitants of Rhode Island considered themselves English subjects is clear from a preamble

to a law enacted in May, 1728, "and judging it an infringement upon the Liberties and Privileges of the English Subjects to inrich the one at the immediate ruin of the other." (*Digest 1744*, p. 104.)

Such being the laws of England, and such being the relations of the Rhode Island colonists to the law of England, it remains to examine the question in the highest judicial courts of the realm, and there learn the opinions of those eminent judges upon it. In 1678 parliament enacted "that in the Plantations, or elsewhere, where English colonies are settled they are to be governed by the laws of England." (*Car. Parl.*, 31.) In 1692 it was held in the Court of the King's Bench that in the case of an uninhabited country newly found out, by English subjects, all laws in force in England are in force there (*Case Blancard* v. *Galdy*, *5 W. & M.*, *Trin. Salkeld*, 2, 411). That these laws and the decisions under them were believed in Rhode Island to be effective, is shown by a law enacted by the General Assembly in 1700, "that in all things whatsoever where no particular law of this Colony is made to decide and determine the same, that then and in all such cases the Laws of England shall be in Force, any usage, custom or law to the contrary notwithstanding." (*Digest 1719*, p. 45). It was held in the chancery court that no English colony, whether

obtained by conquest or acquired by settlement, could maintain or could enact laws "contrary to our religion." This was in 9th George the First, 1722 (*2 Peere Williams*, 75). At a later period it was held that "Every description of transmarine possessions is under all circumstances, and whatever may be its political constitution, subject to the control of the British Parliament." It was, still later, held that the colonies were not affected by laws unless specially named, excepting in the cases where the nature of the act obviously intended to affect all English possessions. (*Stephens' Comment.*, 1, 99, 100.)

This principle did not become established and well settled until the time of Lord Mansfield. This judge decided in the case *Rex* vs. *Vaughen*, 4 Burrows, 2494, that no act of parliament made after a colony is planted is construed to extend to it without express words showing the intention of the legislature that it should. Had it not been before an open question there would not have existed the necessity for this decision. It was made by Lord Mansfield in the year 1769.

In the light of such laws and decisions the General Assembly ordered a new transcription of the laws for the purpose of printing them. A committee was appointed July, 1715, to perform the work. Changes were made in it from time to time, the work finally

falling upon the "general recorder" or Secretary of State, Richard Ward. (*R. I. Col. Rec.*, 4., p. 234.) This person was to "fit the laws for the press with marginal notes thereon." His work is now known as the Digest of 1719.

All this has before been stated and is here recapitulated for the purpose of showing the conditions under which the codification of 1719 was undertaken.

The severest anti-Roman Catholic laws had for many years been enacted in England. The last of these laws was enacted, as herein shown, in 1715, and in which English citizens in Rhode Island had been given until June, 1717, in which to take the oaths abjuring their religion if Roman Catholics in order to hold land in England. At that very time the General Assembly was engaged in making the first printed Digest, that of 1719, in which the anti-Roman Catholic law first appears. Under the charter every one of these men were legally citizens of England, because under the charter they possessed the same rights and liberties as if born in the realm of England. In enacting a law declaratory of the rights and privileges of *His Majesty's subjects* within this colony, how could the Rhode Island General Assembly *include Roman Catholics* in the face of the direct command of the charter to make "no laws *repugnant* unto but as near as may be *agreeable*

to the laws of this our realm of England" and in the face of general legal opinion formulated in a decision of the highest court cited above, that no colony could enact laws "*contrary to our religion.*" Would the colonists of Rhode Island, English citizens as they were, under the restrictions shown, and in the face of such judicial opinion, have been justified in conferring political rights upon other English citizens, which by the statutes of England were denied to those citizens? They certainly could not. Hence when the secretary of the colony re-drafted the act in question, may he not have felt obliged to exclude such people as the statutes of England excluded? It must not be forgotten that the period of this law was 1719 even if it was spurious at that date, and not 1663; and in examining it, the political conditions in England must bear with great weight upon it.

There is still another phase of this question to be considered. In his address before the Pennsylvania Historical Society, Mr. Craig Biddle makes use of this phrase (p. 24,) in reference to this law: "In the oldest printed copy of its laws now extant, the Roman Catholics are excepted from the enjoyment of freedom of conscience." The question naturally arises can a citizen of a state be granted the privilege of worshipping God according to the dictates of his own con-

science, and still be denied political rights? Can the elective franchise be withheld from those who pay a part of the money collected by taxation? It is beyond question that an affirmative answer must be given in both cases. A man can be admitted to vote, and at the same time not forced to say mass; so a man could be permitted to dwell in Rhode Island, hold property, and worship God in peace, and still not be admitted a freeman. He might hold property securely, but the political rights, or powers, which such property conferred upon other people might be withheld from him. This, however, would in no manner abridge his freedom of conscience. He could enjoy such religion as he liked and was willing to pay for, and he was not required to pay for the religion of anybody else.

By the English act of government, 1664, "parliamentary restrictions were imposed on members of the Council, officers of state, and others. Liberty of worship was secured to all but papists, prelatists, Socinians, or those who denied the inspiration of the Scriptures, *and liberty of conscience was secured for all.*" (*Green's Short Hist. England*, p. 579.) A woman to-day in Rhode Island can hold lands and other property, and upon it be required to pay taxation, but she cannot vote, nor hold political office. It is unnecessary to inquire how far this is right, but is the woman here

denied liberty or freedom of conscience, or the permission to worship God according to the dictates of her own conscience? Certainly not. Let us then inquire whether the charter in granting liberty of conscience, made those who enjoyed it freemen of the colony, that is, conferred upon them political rights.

The grant is in these words: "Our Royal Will and Pleasure is that no person within the said Colony at any time hereafter shall be any wise molested, punished, disquieted, or called in question for any differences in opinion in matters of religion, and do not actually disturb the civil peace of our said Colony; but that all and every person and persons may from time to time, and at all times hereafter, freely and fully have and enjoy his and their own judgments and consciences in matters of religious concernments throughout the tract of land mentioned." This certainly conferred religious freedom upon everybody. The king then proceeded to name twenty-five men whom he created a body corporate and politic, and to this body politic the king added "such others as now are or hereafter shall be admitted and made free of the Company." (*Charter*, p. 5.) Hence it appears that the grant of liberty of conscience did not make a colonist *free of the company*, nor did his restriction from the right to become a freeman, deny to him liberty of conscience. As a matter of fact great

numbers of citizens were not admitted freemen. Only a resident owning land of a certain specified value, and his eldest son, the latter without land, could become freemen. The other sons, although born in the colony, could not be admitted freemen without owning land. Were they by the charter denied liberty of conscience? Certainly not. Let us then examine this act and discover whether by it a Roman Catholic was deprived of his liberty of conscience any more emphatically than was this second son.

The act provides, *first*, that no freeman shall be deprived of his freehold or liberty or other enumerated rights, but by the laws of the colony and the judgment of his peers. The phraseology of this portion of the act is precisely that of Magna Charta (*Chap. 29*,) as it has been elsewhere stated.

But there might be men in the colony who held land and who were not freemen. So that, *second*, the act provided "that no man of what estate and condition soever shall be put out of his lands and tenements, nor taken, nor imprisoned, nor disinherited, nor banished, nor any ways destroyed nor molested, without being for it brought to answer by due course of law."

Third, the act proceeds to declare that "all rights and privileges granted by His Majestys Charter be entirely kept and preserved to His Majestys subjects."

Lastly, the act proceeds to declare that "all men professing Christianity, and of competent estates, and of civil conversation, and are obedient to the civil magistrate, though of different judgments in religious affairs (Roman Catholics only excepted) shall be admitted freemen."

The act does not prohibit a Roman Catholic from holding lands in the colony. It only declares that the holding of land shall not make a Roman Catholic a freeman or voter. The act protects every "man of what estate or condition soever," in his land and property, and to this protection a Roman Catholic was not denied.

It has been herein maintained that the act of the colonists did not infringe the charter, in that it did not abridge that liberty of conscience which the charter granted; but if it did abridge that liberty, I now maintain that it was through no fault of the colonists, but it was because of conditions forced upon them by the English government. By the English statutes of the period an English Roman Catholic could hold no office in the government, either civil or military; but in Rhode Island he could have held a military office; that same individual could have held no land in England, while in Rhode Island his estates would have been secure; an English Roman Catholic, owning land

in England but resident in Rhode Island, was obliged to abjure his religion or forfeit his lands, while in Rhode Island no such oath was exacted of him. The colonists were forced a certain distance, but they went no farther than they were forced. They were obliged to make laws which were "*agreeable*" to the laws of England. The English Parliament possessed the power to alter, amend or annul the charter; if it was changed, it was changed by the laws made by that body, and not by the colonists.

The word "freeman" means simply a voter, neither less, nor more. The colonists were not obliged to admit anybody to the exercise of the elective franchise; they could admit or decline to admit, as they saw fit, and they could prescribe conditions. These things they did; they made the possession of land one of these conditions; one man with a little land was made a freeman, or voter, while another possessed of a hundred times as much property, but personal in its character, could not be a freeman; all women were denied political rights; and all second sons were denied political rights, on terms of equality with their elder brothers; and yet these people could all follow the precepts of such religion as they desired, or none at all, without molestation or question from anybody; so indeed it was with Jew or Gentile, Turk or Roman

Catholic. Where else upon the globe was there that day a spot so favored, as was this little colony of Rhode Island, even under this law for which she has so long been maligned for enacting.

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